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No. 1032

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

GEORGE A. LEE, *Petitioner*,

vs.

WESTERN WOOL PROCESSORS, INC., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	Page
OPINION BELOW	1
STATEMENT OF THE CASE	2
ARGUMENT	4
No departure from the usual course of judicial administration has occurred	4
No formal prior order being involved here, a judge of the District Court does not commit error nor abuse his discretion in ordering monies removed from Registry to be replaced, and there is no conflict among the Circuit Courts.	6
No error of law was committed in requiring Petitioner to redeposit monies into Registry.	8
No matter of public importance is involved in this matter which should occupy the attention of this Court.	10
CONCLUSION	11

CITATIONS

CASES:	Page
Lee v. Western Wool Processors, Inc., 313 F. 2d 13 (10th Cir. 1962)	4, 6, 7, 9
Rachel Castner v. First National Bank of Anchorage, 278 F. 2d 376 (9th Cir. 1960)	5
United States v. Wheeler, 256 F. 2d 745 (3rd Cir. 1958)	7

Page

Colonial Life and Accident Insurance Company v. Wilson, 246 F. 2d 922, *Cert. den.* 355 U. S. 927 (5th Cir. 1957) 9

Fant v. Miller, 218 S. W. 2d 901 (Tex. Civ. App 1949) 9

Norskog v. Atha, 61 Ohio L. Abs. 604, 102 N. E. 2d 907 (1951) 9

United Securities Corporation v. Franklin, 180 A. 2d 505 (D.C. Municip. Ct. of App. 1962) 9

Layne & Bowler Corporation v. Western Well Works, Inc., et al 261 U. S. 387 (1923) 10

ENCYCLOPEDIA: Page

40 *Am. Jur.*, Payment § 36 9

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondent prays that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit applied for herein by the petitioner be denied.

Opinion Below

The opinion of the United States Court of Appeals in this case appears in 313 F. 2d 13 (10th Cir. 1962).

Statement of the Case

The petitioner is asking the Court for a Writ of Certiorari to review an order of Judge William E. Doyle of the United States District Court for the District of Colorado which requires the petitioner to redeposit certain funds to the registry of the court. This order was entered on March 5, 1962. The order was appealed to the United States Court of Appeals Tenth Circuit, where it was affirmed. *Lee v. Western Wool Processors, Inc.*, 313 F. 2nd 13 (10th Cir. 1962).

The sequence of events leading to the subject order are as follows:

The petitioner, George A. Lee, plaintiff below, recovered judgment against the respondent, Western Wool Processors, Inc., the defendant below, on February 21, 1961 (R. 3). The judgment was based upon a note payable by the respondent and was obtained without the necessity of a hearing by stipulation of the parties (R. 2). The order granting judgment was signed by Judge Hatfield Chilson.

Execution on the judgment was to be stayed until the court could hear the merits of respondent's counterclaims (R. 3). On July 13, 1961 Judge Orie L. Phillips vacated the stay of execution (R. 3).

Petitioner then began to initiate execution proceedings against the respondent's plant facilities. On November 6, 1961, the respondent's counterclaims still not being heard, respondent petitioned the court for an early pretrial date (R. 4) and offered to place the total amount of petitioner's judgment plus interest and attorney's fees into the registry fund of the court until the hearing on the counterclaims was completed. This was stipulated to by the parties and an order accomplishing this was signed by Judge Hatfield Chilson on November 22, 1961 (R. 5, 6). This order included a provision that respondent must reimburse petitioner's counsel the amount of certain expended costs and expenses within ten days from the receipt of a state-

ment as to their amount (R. 5). If payment was not made within the period provided plaintiff could withdraw the amounts deposited in the registry fund without further order of the court (R. 5). Pursuant to this order, respondent deposited with the court the sum of $17,237.44.

Counsel for respondent received the statement of expended costs of $50.19 on December 22, 1961 (R. 7, 9). The requested amount was posted to petitioner's attorneys on January 2, 1962, the legal tenth day (R. 9, 19) and received by petitioner's attorneys on January 3, 1962, the day following (R. 10, 19). On the day of receipt and after actual receipt, one of the counsel for respondent talked by phone with one of the attorneys for the petitioner and advised him that the check had been sent. The attorney for petitioner intentionally withheld any disclosure that his office was in the process of attempting to withdraw the funds from the registry of the court (R. 9), he did not return the check sent in payment and subsequently cashed the same through his regular office account.

On January 3, 1962, both law offices representing the parties were aware of the fact that Judge William E. Doyle was assigned this case. On the morning of January 3, 1962, according to Judge Doyle's opinion (R. 19), counsel for the petitioner made an oral application requesting release of the deposit to petitioner on the theory that payment of the expended costs had not been received in conformance with the existing order. Judge Doyle asked counsel to prepare an order and he would consider petitioner's request (R. 19). Counsel for petitioner returned to his office to prepare an order, but in the afternoon, already having received payment of the costs, he returned not to Judge Doyle, but to Judge Hatfield Chilson and waited there until five o'clock and obtained Judge Chilson's signature on the clerk's check for the amount in the registry fund. This was handled as a summary matter without a hearing (R. 19). The order requested by Judge Doyle was not signed.

Counsel for the respondent did not discover the with-

drawal of the funds until February 20, 1962, when they paid an interest payment in conformance with the Court's order (R. 10). Upon this discovery a Motion For Order Requiring Re-Deposit of Monies Withdrawn From the Office of The Clerk of The Court was promptly filed (R. 9, 10). Judge Doyle ordered the return of the funds by his order dated March 5, 1962 (R. 19, 20, 21).

The United States Court of Appeals, Tenth Circuit, affirmed Judge Doyle's order in *Lee v. Western Wool Processors, Inc.*, 313 F. 2nd 13 (10th Cir. 1962).

Petitioner is requesting review of Judge Doyle's order as affirmed.

Argument

In argument the respondent shall restrict himself to the questions set forth by the petitioner and an assertion that this case is not of such public importance as to warrant review by this Court.

I

No departure from the usual course of judicial administration has occurred.

The first question presented by the petitioner is:

> In affirming the judgment of a judge of the District Court overruling and reversing a prior Order of a Judge of the same court, has the Court of Appeals so far sanctioned departure from the usual course of judicial administration as to require correction by this Court?

A careful examination of the record reveals that a second judge of the District Court at no time overruled or reversed an Order of a first judge in the sense discussed in the cases cited by the petitioner.

When petitioner withdrew the funds from the registry fund of the court the outstanding order under which both parties were operating was that order which created the deposit signed by Judge Hatfield Chilson on November 22, 1961. The fact that Judge Chilson signed this order was a fortuitous event inasmuch as the order was stipulated to by the parties. It was signed as a matter of course and could have been entered by any judge of the court.

Judge Doyle was assigned this case sometime after the signing of the November 22, 1961 order.

When petitioner desired to withdraw the funds, his counsel approached Judge Doyle with his request which was made orally (R. 19). Judge Doyle informed petitioner's counsel that he would permit the withdrawal of funds only upon his consideration of an order which he requested be prepared and presented to him. He in effect modified the November 22, 1961 order in that regard. It is unchallenged that this was within Judge Doyle's proper discretion. It is an accepted practice that a judge, following his appointment to a case may review prior orders in the case and amend them or overturn them if he deems it necessary. *Rachel Castner v. First National Bank of Anchorage, Artic Cold Storage, Inc., and Union Bank of Anchorage*, 278 F. 2nd 376 (9th Cir. 1960). On the same day, petitioner, however, approached Judge Chilson who was not assigned this case and secured his signature on the check withdrawing the funds, apparently representing he was entitled to the same as a matter of course. No formal order was entered.

One and one half months later upon discovery of the removal of the funds, counsel for respondent filed a motion asking redeposit. Judge Doyle, as the judge assigned, heard the motion in due course. In ordering the funds returned to the registry of the court, Judge Doyle, after a full hearing of all of the facts, stated (R. 20):

"Normally, the ruling of one of the judges of this

> Court would not be reviewed or reconsidered by another judge, but this is not the situation presented. No formal order was entered as had been originally suggested . . . ."

Judge Doyle correctly ruled that a self-executing order of the Court had been abused by the petitioner and ordered the funds redeposited. It was clearly within his duty as the judge assigned to the case to see to it that orders of the court received full compliance by the parties.

In affirming Judge Doyle's order, Judge Lewis in *Lee v. Western Wool Processors, Inc., supra* at page 16 states:

> "Nor does the order requiring re-deposit constitute a prohibited reversal by one district judge of the order of another. The act of signing the check allowing withdrawal of the monies was not a formalized order and was not premised upon a determination of either law or fact. The order appealed from held only that a self-executing order of the court had been abused by plaintiff and such determination was made by the judge to whom the matter was regularly assigned. And, in fact, the motion was heard only after full understanding by both judges of the procedural complications involved."

The order given by Judge Doyle clearly is not so radical a departure from the usual course of judicial administration as to require correction by this Court.

II

No formal prior order being involved here, a judge of the District Court does not commit error nor abuse his discretion in ordering monies removed from Registry to be replaced, and there is no conflict among the Circuit Courts.

The second question presented by petitioner is:

> When one judge of the District Court reviewed and construed his own Order and ordered the payment of the amount of petitioner's judgment out of the Registry of the Court in conformity with such Order, is it error and an abuse of discretion for a judge of the same Court to overrule and reverse the action of his colleague judge when the facts and circumstances under which both judges were acting were identical and the first judge was available to reconsider his Order?

The question as posed by petitioner assumes that the signing of a check is the equivalent of the signing of a formal order. Such is not the case and was so determined by the court below *Lee v. Western Wool Processors, Inc., supra* at page 16.

Nevertheless to appropriately meet the question as posed it will be assumed ARGUENDO *that an order was actually involved here. The authorities as cited by petitioner actually support respondent's position.*

In *United States v. Wheeler*, 256 F. 2d 745 (3rd Cir. 1958) at pages 747, 748, an example of the cases cited by the petitioner as illustrative of the general rule that one judge of the District Court cannot and should not attempt to overrule or reverse the action of another judge of the same court, it is said:

> ". . . . But it is not always possible at the outset to determine whether the identical matter is simply being presented over again for reconsideration, or whether more accurately the matter is being reopened and additional matter presented bearing on the same question of law once decided on what was so far available. In that latter situation the question has not really been decided earlier and is posed for the first time. The second judge ought, therefore, be free to render a decision."

When Judge Chilson gave petitioner permission to draw the funds he was not aware that there was a question of law involved, and being an *ex parte* proceeding it was not brought to his attention. He was not fully aware of the prior proceeding before Judge Doyle nor was he aware of the facts surrounding respondent's belief that the submitted check had been accepted in compliance with the prior order.

Judge Doyle gave his order to redeposit the monies only after having considered all of the above facts. He stated in his opinion (R. 20):

> "The undersigned is firmly of the opinion that the ex parte release of these funds would not have been permitted had the facts been clearly understood by Judge Chilson at the time."

Thus, even assuming the signing of the check to be a formal order it would have been entirely proper for Judge Doyle to rule as he did under the cases cited by the petitioner to support the opposing view. Therefore, there is no conflict of the cases among the circuits and the Tenth Circuit has rendered a decision in full agreement with the other circuits in affirming Judge Doyle's order.

III

No error of law was committed in requiring petitioner to redeposit monies into Registry.

The third question presented by the petitioner follows:

> Did the Court of Appeals commit error in affirming the judgment of the District Court requiring payment of the amount of Petitioner's judgment into the Registry of the Court?

Under the order of November 22, 1961 there was a provision that petitioner's attorneys should be reimbursed for certain costs within ten days after the receipt of a statement by

respondent. The facts are not disputed. Petitioner mailed the statement of costs and respondent's counsel received the statement on December 22, 1961. Counsel for respondent mailed the check for the costs to petitioner's counsel on January 2, 1962, the legal tenth day.

It is universally held that where the usual course of dealing between the parties is by mail, payment may be made by mail, and in so using the mails, the post office becomes the agent of the creditor, and a mailing on the last day of a designated period is timely payment. *Colonial Life and Accident Insurance Company v. Sarah Ethel Wilson*, 246 F. 2d 922, *cert. den.* 355 U.S. 927, (5th Cir. 1957), *Fant v. Miller*, 218 S.W. 2d 901 (Tex Civ. App. 1949), *Norskog v. Atha*, 61 Ohio L. Abs. 604, 102 N.E. 2d 907 (1951), and the recent case of *United Securities Corporation v. Franklin*, 180 A. 2d 505 (D.C. Municip. Ct. of App. 1962). No series of payments is required, a usual course of dealing between the parties or other facts from which such direction or assent may be inferred is sufficient *Fant v. Miller, supra, United Securities Corporation v. Franklin, supra*, also see 40 *Am. Jur.*, Payment § 36, at page 737.

Judge Lewis in the Court of Appeals opinion, *Lee v. Western Wool Processors, Inc., supra* at page 16, stated:

> "In interpreting its own order the trial court held that the payment was timely; that the usual course of dealings between the parties established the use of the mails for payment, and drew inference from the facts that the lawyers were in different cities, the statement of costs had been mailed, and all other service and negotiations by the parties in connection with this law suit had been submitted by mail. Under these circumstances, we find no error of law and the finding of the trial court cannot be set aside as clearly erroneous . . ."

Petitioner cited the above passage in the Petition for Writ of Certiorari as a "resort to fiction and analogies to the law of payment" obviously feeling that the law of payment does not apply. Yet petitioner did not cite one case which would indicate that the law of payment was not applicable nor did petitioner give an argument or cite any cases which would show that this fact situation should stand by itself and have different rules applied to it.

The Court of Appeals decision was correct on the merits in its affirmance of Judge Doyle's order.

IV

No matter of public importance is involved in this matter which should occupy the attention of this Court.

Lastly, respondent submits to this Court that this order is not of such public importance as to warrant review. The fact situation concerns an order entered during the course of litigation requiring petitioner to replace certain funds withdrawn from the registry account. Petitioner suggests that the basically simple facts are vastly complicated under the questions argued above. It is submitted that determination of these questions, while of extreme importance to the parties involved, can hardly add significantly to the law. A decision determining the applicability of the law of payment where counsel's mailed check is received on the date application is made for withdrawal can hardly be expected to have wide applicability thereafter. Neither can a decision determining one District Judge's jurisdiction to hear and determine a motion for redeposit of funds into registry after an alleged improper removel be expected to have wide application. Finally it should be noted that there is no statutory or constitutional provision here which should occupy this Court's attention.

In *Layne & Bowler Corporation v. Western Well Works,*

Inc., et al. 261 U.S. 387 (1923) at page 393 Mr. Chief Justice Taft for a unanimous Court stated:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

This language is particularly appropriate here.

Conclusion

The ruling of the Court of Appeals is clearly in the usual course of judicial administration and does not conflict with decisions in other circuits. Further, this case is not of sufficient public importance to warrant review by this Court.

Respectfully submitted,

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